Supreme Court, U.S.
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NO. 92-1349

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ERNEST D. SHARP
Petitioner

versus

JOHNSON BROTHERS CORPORATION, et al.,
Respondents

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I. The questions presented fail to merit review.

II. Sharp and Wausau's case is moot because of the signed releases, the settlement approval and election of remedies and because the Jones Act and LHWCA are mutually exclusive statutes.

III. The statutory mechanism for approval of LHWCA settlements, and findings made pursuant thereto, are binding on Sharp and Wausau. The Department of Labor's order and findings are not merely a consent judgment.

IV. The lack of candor in failing to disclose settlement violated fair play requirements and unduly continued terminated litigation.

LIST OF PARTIES

Centennial objects to the Sharps' list of parties. The Sharps have settled and have assigned their claim, if any, to Employers Insurance Company of Wausau, who is the real party in interest in these proceedings and not just an intervenor.

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STATEMENT OF THE CASE

Ernest Sharp, claiming to be a seaman, sued his employer, Johnson Brothers Corporation ("Johnson Bros.") under the Jones Act, and the general maritime law. Sharp, a shore-based welder, was temporarily working on a bridge repair project in Lake Pontchartrain. Sharp previously reported his claim to the Department of Labor and received from Employers of Wausau (Wausau) full compensation and all medical benefits for several years under the Longshore and Harbor Workers' Compensation Act ("LHWCA"). The Department of Labor determined that Sharp's claim fell within the jurisdiction of the LHWCA. (Appendix at A-2). Sharp was pronounced able to return to work and was offered continuation of his employment as a welder by Johnson Bros., but he turned down the job choosing rather to pursue his Jones Act claim in court.

St. Paul Fire & Marine Insurance Company ("St. Paul"), the primary P&I insurer of Johnson Bros. on the tug FERDIE CANDIES, undertook without reservation the defense of Johnson Bros. for the Jones Act and general maritime law claims, and later filed a third party complaint against Centennial Insurance Company ("Centennial"), a P&I insurer of a dumb unmanned barge on the bridge construction project that had been chartered to Johnson Brothers.[1] All defendants contested Sharp's claim that he was a seaman. It was not disputed that Wausau was the

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[1] Sharp subsequently amended his suit to sue Centennial, St. Paul and Wausau under the Louisiana Direct Action statute, La.R.S. 22:658, which (at that time) allowed a tort claim to be asserted directly against a party's insurance carrier, but later the law was interpreted to not permit this type of suit.

insurer of Johnson Bros. for all compensation and medical payments made under the LHWCA and Wausau also provided Jones Act coverage for Sharp's claims against Johnson Brothers. (Appendix A-19-26).

Sharp's Jones Act claim was tried in the district court. After several days of testimony on the question of seaman status, the district judge entered a directed verdict rejecting Sharp's claim to seaman status. Sharp v. Johnson Bros. Corp., 719 F.Supp. 516 (E.D. La. 1989). The decision was based upon a finding that there was absolutely no evidence to support Sharp's claim for seaman status.[2] Judgment was rendered on June 15, 1989 and entered on October 17, 1989.

Next, Sharp then filed a motion to set for hearing his compensation claim against Johnson Brothers and Wausau under LHWCA and the case was set for hearing before an ALJ in September 1989. Immediately prior to the hearing, the parties then voluntarily settled all of the LHWCA and Jones Act claims for a cash payment totaling $225,000.00. This cash settlement was known only to Sharp, Johnson Brothers and Wausau and their attorneys. The settlement approved by the Administrative Law Judge was based upon his finding of jurisdiction over the claim and a formal order of approval and findings were entered, as is required by § 908 (i) of the LHWCA and the Code of Federal Regulations. (Petitioner's Appendix at A-32). In addition to that LHWCA settlement on October 5, 1989, the Sharps also entered into a side or secret "Receipt, Release, Indemnity and Distribution of Litigation Proceeds Agreement" under which the SHARPS received an additional $25,000.00 in cash (making for the total

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[2] The District Court further found that Sharp, a shore-based welder/pile driver, was not permanently assigned to a vessel or identifiable fleet of vessels and that the barges on the work site were stationary work platforms, and not "vessels" for purpose of the seaman's claim.

payment of $225,000.00) pursuant to the insurance coverage which Wausau had issued to Johnson Bros. The secret $25,000.00 settlement agreement was withheld from the Record before the Department of Labor and was also withheld from this Court by Petitioners. Centennial produces herewith a copy of this Agreement at Appendix A-7.

In this agreement the Sharps received $25,000.00 to release both the Jones Act and maritime claims. Under the secret disbursement and payout provision, if the Sharps recovered money under any theory from Centennial or St. Paul including a claim under 905 (b) of the LHWCA, Sharp's attorney would receive a contingency fee of 40% plus $15,000.00 in expenses. Interestingly enough, Sharp's attorney recited to the Department of Labor in the 8 (i) application that he waived his contingency fee. The Sharp's further agreed the first $225,000.00 recovered would be paid directly back to Wausau and acknowledged that if the proceeds were insufficient to pay the first $225,000.00, the entire amount of the remaining proceeds would be paid directly to Wausau. Cleverly Wausau orchestrates this appeal in Sharp's name whereas in fact Wausau is not "just an intervenor" but Wausau is the real party at interest in this appeal and has been since the settlement and Sharp's statements to the contrary in their brief are not true.

After the settlement was made the first appeal was then filed by Sharp with the Fifth Circuit but no mention was ever made to that court that Sharp had already settled his claims. The settlement was intentionally withheld and kept secret by Sharp, Johnson Bros. and Wausau and their counsel. This tactic and breach of the ethical duty of candor was noted in the second

appeal to that court.[3] Sharp and Wausau then continued to perpetrate their charade by staging an argument before the Fifth Circuit, in an already mooted case, and representing that there was a bona fide dispute as to whether Sharp was a Jones Act seaman. The Fifth Circuit, unaware that the case had been settled and an election of LHWCA coverage made, issued an opinion vacating the district court's granting of a directed verdict and remanding the case back to be submitted to a jury on the seaman status issue. Sharp v. Wausau Ins. Companies, 917 F.2d 885 (5th Cir. 1990).[4]

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[3] The Circuit Court noted:

> As a final note, we are distressed by the conduct of the attorneys for Sharp, Johnson Brothers, and Wausau during the previous appeal. Although we have no basis upon which to ascertain their motives, we are surprised that the parties failed to bring to our attention the fact that they had settled at least one aspect of their dispute. We recognize that counsel may legitimately have believed that the LHWCA settlement was irrelevant to the Jones Act action. Nevertheless, candor and respect for this court would dictate that the parties inform us of so significant a development in their litigation.

Sharp v. Johnson Bros., 973 F.2d 423, 427 n.3 (5th Cir. 1992).

[4] This opinion is not reproduced herein. Respondent submits that this opinion was moot since the time of Sharp's settlement. This Court has expressed its very serious concern over the failure of counsel to disclose to the Court "any development" which conceivably affects the outcome of the case. See Fusari v. Steinberg, 419 U.S. 379, 391 (1975). See also Piambino v. Bailey, 757 F.2d 1112 (11th Cir. 1985), cert. denied, 476 U.S. 1169 (1986), and In re: Universal Minerals, Inc., 755 F.2d 309, 312-13 (3d Cir. 1985).

Following remand to the district court, it was then for the first time discovered by Centennial at a status conference that Sharp and Wausau had settled all claims. These settlement and release papers are still conspicuously absent from Petitioner's Appendix and WE MUST AGAIN QUESTION WHY THAT HAS OCCURRED HERE IN THIS COURT. These papers are produced herein at Appendix A-7. Hence, Petitioner Sharp is no longer the real party in interest — it is Wausau, but Wausau has not requested certiorari. Sharp's Petition for Certiorari is obviously moot because he has settled his case against his employer.

After discovery of the settlement, Centennial moved for summary judgment. The District Court held, and the Appeals Court affirmed, that Sharp's voluntarily election of settlement in accordance with 33 U.S.C. § 908 (i) constituted a binding election of remedies barring the Jones Act suit. Sharp v. Johnson Bros., 973 F.2d 423 (5th Cir. 1992). The Fifth Circuit agreed that the Department of Labor approved the settlement when it precluded further litigation based upon previous decisions of the Appellate Courts. See, e.g., Vilanova v. United States, 851 F.2d 1, 4 (1st Cir. 1988), cert. denied, 488 U.S. 1016 (1989).

Certiorari here is sought on grounds that the Fifth Circuit declined to follow this Court's decision in Southwest Marine, Inc. v. Gizoni, 112 S.Ct. 486 (1991), and Sharp (Wausau) attempts to characterize the binding settlement approved by the Administrative Law Judge as merely a "consent judgment." As explained below, this argument lacks merit and the Petition should be denied. The lower courts followed the precedents of this Court and the Sharps were paid money and have made an affirmative election of remedies and have also settled the LHWCA, Jones Act and general maritime law claims. NOTHING MORE REMAINS HERE TO BE LITIGATED.

ARGUMENT

I. THE QUESTIONS PRESENTED FAIL TO MERIT REVIEW.

The questions raised by Sharp-Wausau do not merit review nor do they articulate any "special and important reasons" required by Rule 10 of the Supreme Court of the United States to support the argument that this Court should exercise its discretionary power of review. Rule 10 indicates that there must be a substantial federal question presented to warrant the granting of certiorari. The questions presented here relate solely to factual issues, and do not present substantial issues of law as required by Rule 10. The Fifth Circuit's decision is not in conflict with a decision of this Court or of another Federal Appellate Court, nor has the Fifth Circuit decided a federal question in a way which conflicts with a state court of last resort. There simply is no evidence that the Court of Appeals has "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court" as to warrant an exercise of this Court's power of supervision. Rather, as shown below, the decision below is in full accord with the LHWCA, the Jones Act, and the precedents of this Court.

Certiorari should not be granted "except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties," and where "there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 79 (1955) (quoting Layne & Bowler Corp v. Western Well Works, Inc., 261 U.S. 387, 393 (1923)). No such reasons exist in this case. Wausau is merely cleverly seeking under its assignment to recover what it was required to pay the Sharps below and is attempting to re-argue the case which Sharp lost. This Court has stressed that it

does not "sit for the benefit of particular litigants." Rice, 349 U.S. at 74. It is therefore submitted that this Court should not exercise its discretionary power of review merely for Wausau benefit and the request for certiorari should be denied.

II. SHARP AND WAUSAU'S CASE IS MOOT BECAUSE OF THE SIGNED RELEASES, THE SETTLEMENT APPROVAL AND ELECTION OF REMEDIES AND BECAUSE THE JONES ACT AND LHWCA ARE MUTUALLY EXCLUSIVE STATUTES.

It is well established that the Jones Act and the LHWCA are mutually exclusive statutory regimes and that the LHWCA expressly excludes from its coverage "a master of member of a crew of any vessel." McDermott International, Inc. v. Wilander, 498 U.S. 337, 111 S.Ct. 807 (1991); Southwest Marine, Inc. v. Gizoni, 112 S.Ct. 486, 491 (1991). Sharp and Wausau elected on the eve of the administrative hearing to be covered by the LHWCA and they both sought the Department of Labor's approval that the claim was covered by the LHWCA. (Appendix at A-2).

Many self-serving clauses are included in the settlement documents but the Administrative Law Judge could only approve the settlement if the claim fell under the jurisdiction of the LHWCA. It is significant to note that no one raised that the settlement was ineffective because Department of Labor lacked jurisdiction. Sharp and Wassau merely contend that he did not intend the settlement to bar a Jones Act claim, but the settlement papers have already been correctly interpreted by the lower courts to the contrary.

The trial judge noted that Sharp, similar to the claimant in Vilanova had acted:

> Secondly, I think that the settlement with the Department of Labor constitutes an election of remedies and precludes the filing of a suit on claims based on general maritime law or the Jones Act or Section 905(b). ... Obviously the law judge believed he had jurisdiction and exercised that jurisdiction in order to confect the award.
>
> Finally, in Vilanova, "Here by seeking and then signing the settlement, Vilanova solicited and then acquiesced in the Department of Labor's finding that his injuries are compensable." And this goes even further. It refers to he is collaterally estopped from contesting Longshoreman and Harbor Worker Act coverage. Finally — thirdly, rather. I have a hard time finding a remaining claim against the insurers. These are indemnity policies. The claims — there is no claim against Johnson Brothers. Johnson Brothers is completely relieved of liability, as I read these various settlement documents, only to the extent that Johnson Brothers might be insured. So there has got to be a time when a liability on an insured having been terminated, and the insurer's responsibility being vicarious and derivative, should be deemed to have terminated as well. And I so find here... .
>
> The record in this case, the settlement documents, are replete with circumstances which

> are prejudicial to the Jones Act insurers, and the general maritime law insurers. One, there is a clear stipulation as to vessel status. Secondly, in effect there has been a $200,000 lien stipulated. thirdly, (sic) that self-serving opening statement that deals with not only a fleet of vessels, but the declaration that, had Sharp's claims been presented to a jury, more likely than not the jury would have determined the plaintiff a seaman, entitled to seaman's remedies, would be extremely damaging and hurtful to these parties on a trial.

(Petitioner's Appendix A-17-18).

In Gizoni, this Court reiterated the long standing rule that the "mere acceptance" of LHWCA benefits pending trial of a Jones Act suit does not in it of itself constitute an election of remedies or bar a claimant from pursuing a Jones Act claim. Here, the Fifth Circuit followed and recognized this rule specifically finding that Sharp went beyond "mere acceptance" of benefits and had affirmatively entered into a binding settlement. 973 F.2d at 426. Sharp and Wausau ignore this direct, uncontradicted finding in an attempt to pose a question for this Court to review. They also ignore that several hearings were scheduled with the Department of Labor to resolve Sharp's claim for LHWCA benefits. On the eve of a formal hearing before an Administrative Law Judge, Sharp, Johnson Bros. and Wausau voluntarily entered into a binding settlement, which was later approved by the ALJ. Sharp's consideration was $200,000.00 in addition to the $68,000.00 in compensation and medical benefits previously paid and a "side" $25,000 paid to them. The district court and the Fifth Circuit correctly ruled after reviewing the statutory requirements of the LHWCA and jurisprudence that the LHWCA settlement and signed Releases under §908 (i) bars a

later Jones Act suit and constitutes an affirmative election of remedies, and was therefore distinguishable from the mere acceptance of LHWCA benefits. See Sharp v. Johnson Bros., 973 F.2d 423, 426 (5th Cir. 1992).

III. THE STATUTORY MECHANISM FOR APPROVAL OF LHWCA SETTLEMENTS AND FINDINGS MADE PURSUANT THERETO, ARE BINDING ON SHARP AND WAUSAU. THE DEPARTMENT OF LABOR'S ORDER AND FINDINGS ARE NOT MERELY A CONSENT JUDGMENT.

A review of the LHWCA's statutory history shows that the lower courts' interpretation of the settlement was correct. Under § 905 (8) (a) of the LHWCA Congress provided that compensation and medical benefits are the exclusive remedies of an employee against his employer for injuries coveredby the Act. Gizoni, 112 S.Ct. at 491; Moore v. Phillips Petroleum Company, 912 F.2d 789, 791 (5th Cir. 1990). This Court considered the purpose and scope of the LHWCA in South Chicago Coal and Dock v. Bassett, 309 U.S. 251 (1940), and noted:

> Its general scheme was to provide compensation to employees engaged in maritime employment, except as stated, for disability or death resulting from injuries occurring upon navigable waters of the United States where recovery through workmen's compensation proceedings might not validly be provided by state law.
>
> * * *
>
> For those employees who are entitled to compensation, the remedy under the Act is exclu-

> sive. Section 5 [33 U.S.C. §905] This made inapplicable for such employees the provision of § 33 of the Merchant Marine Act (called the Jones Act) which carried to "seamen" at their election the benefit of the provisions of the Federal Employers' Liability Act. The Bill, which became the Longshoremen's & Harbor Workers' Compensation Act, was at one stage amended so as to include a master and members of a crew of a vessel owned by a citizen of the United States. They preferred, however, to remain outside the compensation provisions and thus to retain the advantages of their election under the Jones Act, and the Bill was changed accordingly so as to exempt "seamen." Then, in its final passage, "a master or member of a crew" were substituted for "seamen."

309 U.S. at 256, 60 S.Ct. at 547 (emphasis added).

In Wilander, 111 S.Ct. 807, the Court approved of Bassett and noted:

> We have said that seamen status under the Jones Act is a question of fact for the jury. In Bassett, a LHWCA case, the Court held that Congress had given to the Deputy Commissioner, an administrative officer, the authority to determine who is a "member of a crew" under the LHWCA. 309 U.S. at 257-258, 60 S.Ct. at 547-48. If there is evidence to support the Deputy Commissioner's finding, it is conclusive.

111 S.Ct. at 818.

As the Fifth Circuit found and noted, Sharp and Wausau could have litigated whether he was covered under the LHWCA or by the Jones Act, but instead on the eve of trial they voluntarily decided to enter into a lump sum binding settlement, which settlement was approved by the Department of Labor. Sharp, 973 F.2d at 426. Sharp received the $225,000.00 cash settlement (in addition to compensation and medical expenses previously paid) after the U.S. District Court had dismissed his Jones Act suit and found his evidence lacking that he was a seaman. However, here they continue to ignore the decision of the First Circuit in Vilanova v. United States, 851 F.2d 1 (1st Cir. 1988), cert denied, 488 U.S. 1016 (1989). Vilanova recognized that an employee makes an affirmative election of remedies by entering into a settlement approved by the Department of Labor. As in the Vilanova case, Sharp's claim was found by the Department of Labor to fall within the jurisdiction of the LHWCA. This finding was initially made when the claim was submitted and is totally ignored by Sharp. (Appendix at A-2). The Vilanova court noted that the settlement approved by the Department of Labor has an entirely different effect from a mere application for LHWCA benefits. 851 F.2d at 5. The Vilanova court noted that the U. S. Department of Labor "has special expertise in evaluating work place injuries and more efficient procedures for doing so than the court ...." Id. The entire administrative process for the LHWCA that has been established by Congress is designed to produce "quicker and better decision and promotes national uniformity more than would coverage decisions made by the courts." Id. Sharp, like Vilanova, did not contest LHWCA coverage before the Department of Labor when he had the opportunity to do so. In recognizing that the settlement entered into before the Department of Labor was valid and binding, barring a subsequent suit, the Vilanova court noted:

> Here, Vilanova did not contest LHWCA coverage before the Department of Labor when

> he had the opportunity to do so. Although an injured employee may collaterally attack a Department of Labor finding that his injuries are compensable under the NFIA or LHWCA, we hold that he may not do so when fails to contest coverage in a decision by the Department of Labor. Here, by seeking and then signing the settlement, Vilanova solicited and then acquiesced in the Department of Labor finding that his injuries are compensable. He is, therefore, collaterally estopped from contesting LHWCA coverage.

851 F.2d at 6 (footnotes omitted). As with Vilanova, Petitioner did not contest the LHWCA's initial determination that his claim was covered by the LHWCA. Here Sharp and Wausau went one step further, they also settled the Jones Act claim by a "secret" settlement withheld from both the courts and even the Administrative Law Judge. Therefore, under this settlement the Jones Act claim is barred. Sharp was amply paid for his injuries- and he and Wausau cannot have the best of both worlds.

IV. LACK OF CANDOR IN FAILING TO DISCLOSE SETTLEMENT VIOLATES JUDICIAL FAIR PLAY REQUIREMENTS AND UNDULY CONTINUED TERMINATED LITIGATION.

Both the Sharps and Wausau had a duty to reveal their "real" positions in the case once they settled and before they filed their Notice of Appeal in the first case.

> "The handling of a lawsuit and its progress is not a game. There is an absolute duty of candor and fairness on the part of counsel to both the Court and opposing counsel."

Virzi v. Grand Trunk Warehouse and Cold Storage Co., 571 F.Supp. 507, 512 (E.D.Mich. 1983).

> "Above and beyond the dictates of courtesy counsel have a 'continuing duty to inform the Court of any development which may conceivably affect an outcome' of the litigation. Fusari v. Steinberg, 419 U.S. 379, 391, 95 S.Ct. 533, 540, 42 L.Ed.2d 521 (1975) (Burger, C.J., concurring)."

In Re Universal Minerals, Inc., 755 F.2d 309, 312-13. (3d Cir. 1985).

This Court has noted:

> "[t]his Court must rely on counsel to present issues fully and fairly and counsel have a continuing duty to inform the Court of any development which may conceivably affect an outcome."

Fusari v. Steinberg, 419 U.S. 379, 391 (1975).

In Fusari, this Court was not advised that the Connecticut Legislature had significantly changed its unemployment compensation system. The new statute was not mentioned in the Briefs or mentioned to the Court at oral argument. Chief Justice Burger issued a concurring opinion where he agreed with the majority of the Court that the failure of counsel to disclose this development was "difficult to understand" when "even at oral argument, we were not informed of the changes in state law although both parties filed their briefs after the new statute was passed. ... All parties had an obligation to inform the Court that the system in which the District Court had enjoined had been changed ...." 419 U.S. at 490 (emphasis added).

In Piambino v. Bailey, 757 F.2d 1112 (11th Cir. 1985), cert. denied sub nom, 476 U.S. 1169 (1986), neither the lead counsel nor attorneys for any other party advised the court of the dismissal of another claim involving the same defendant. Id. at 1131. The Court noted that lead counsel's failure to apprise the District Court of the dismissal, on the merits, of the virtually identical claims and the appeal court's later dismissal of the appeal, would appear to subject lead counsel to disciplinary proceedings. Id. at 1131 n.44.

The candor rules demanded that Sharp, Wausau or Johnson Bros. disclose to all Courts the fact that the case had been settled prior to their first Notice of Appeal to the Fifth Circuit. Sharp and Wausau filed two Appeals and Briefs in the Fifth Circuit and represented that there was existing a dispute when in truth and fact there was none. The two settlements removed the central issue (Sharp's seaman status) from the case or at the very least certainly constituted a new development which all Courts and other litigants, particularly Centennial, should have been informed. This is especially true since the Centennial policy does not cover claims under the LHWCA and Johnson Bros. would have no claim against Centennial for reimbursement for the longshore settlement. The record below reflects statements of counsel for Sharp (Mr. Galatas) and counsel for Wausau (Mr. Guilbeau) before the District Court at the hearing:

> THE COURT: And you don't feel you had an obligation to tell the Fifth Circuit about it?
>
> MR. GALATAS: I don't think I had an obligation to tell the Fifth Circuit.
>
> ***

THE COURT: Did not tell the Fifth Circuit?

MR. GUILBEAU: I didn't tell the Fifth Circuit. I didn't think there was an affirmative duty to tell them.

THE COURT: Didn't want them to know about it as a matter of fact?

MR. GUILBEAU: I didn't think it would make any difference. The issue wasn't there. I thought they at that time, you know, it as not a complete settlement. There was not going to be a joint motion to dismiss the case.

THE COURT: Don't think it would have raised perhaps an opportunity for them to pass upon it, whether or not there was an election of remedies?

MR. GUILBEAU: I felt certain they would kick it back. It's not before them. It's not briefed. We're going forward.

THE COURT: And since the trial in the District Court, don't you think they might have wanted some briefing on it? They could have disposed of that issue and saved themselves some time? Of course, if they disposed of it the wrong way, you would have a problem. (Italics added)

MR. GUILBEAU: I don't think it was an affirmative duty. I don't think there was any merit to the argument that the settlement of a longshore

> case, where you specifically reserve the issue of status, would preclude a later or subsequent or ongoing —

(Transcript pp.21, 24-25) (emphasis added).

In Leger v. Drilling Well Control, Inc., 69 F.R.D. 358, aff'd, 592 F.2d 1246 (5th Cir. 1979), the court noted:

> Our holding: An omnipresent characteristic of modern maritime litigation is its mutiparty nature. When one co-defendant settles with the plaintiff and the settlement agreement provides that it is to receive 50% of any judgment recovered from the remaining defendant, then and in that case such an agreement must be revealed prior to trial, so that a full and fair evaluation may be made by counsel and jury.

69 F.R.D. at 361 (emphasis added).

Judge Rubin, sitting on the district bench, when confronted by a secret settlement stated as follows:

> "While lawyers owe a duty to their clients, they owe a primary duty to the administration of justice. They profess to be, and they are, officers of the court."

Daniel v. Penrod Drilling Co., 393 F.Supp. 1056, 1059 (E.D. La. 1975).

Here, as the District Court noted, what has ensued in this litigation is a very sad and sorry example of what the practice of law can deteriorate into when litigants do not exhibit candor with

the Court and attempt to orchestrate litigation in secrecy. The District Judge said it aptly at the conclusion of the hearing in this matter:

> We're lawyers. The public expects more of us than what I have seen displayed in this case. But more importantly, you expect more from each other.

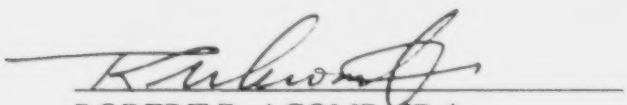
(Petitioner's Appendix at A-21).

Johnson Brothers and Wausau owed a duty to Sharp when he was injured. They sought to shift the duty to another's insurers, namely St. Paul, the insurer of a dumb barge. Once Sharp lost in his trial of the Jones Act case they quickly settled all claims with him even under the Jones Act and General Maritime Law (the secret Release) but then proceeded with an appeal in SHARP's name without disclosing that Wausau would receive the first money back from a settlement or trial. This type of action, if permitted, would result in litigation becoming never ending and the first person to settle would always seek to continue the suit as a way of reducing its loss. All parties were entitled to know of the settlement and perhaps the case would have ended in the first appeal to the Fifth Circuit, not the second appeal. Johnson Brothers and Wausau should not be permitted to profit from their conniving tactics here.

CONCLUSION

Petitioner's request for certiorari should be denied because the questions presented do not merit review. Petitioner's claim has been settled and, having made an affirmative election of remedies and foregoing the right to contest the Department of Labor's finding that Petitioner's claim fell within the jurisdiction of the LHWCA, Petitioner is estopped from claiming recovery under the Jones Act, as the Fifth Circuit so found. The questions presented by Petitioner do not involve important questions of federal law nor has Petitioner demonstrated a conflict among the circuits or disregard of any precedent of this Honorable Court. The Sharps and his employer Johnson Brothers and its insurer Wausau voluntarily settled all claims in this matter, voluntarily signed two separate releases which covered LHWCA claims and Jones Act and Maritime Law claims, then obtained an 8(i) approval of the LHWCA settlement and there the case must end. The factual findings and legal conclusions of the lower courts are clearly supported by the record and are consistent with this Court's pronunciations and the purpose and intent of the Longshore and Harbor Workers' Compensation Act. Therefore, the request for certiorari should be denied.

Respectfully Submitted,



ROBERT B. ACOMB, JR.*
RICHARD D. BERTRAM
Jones, Walker, Waechter, Poitevent,
Carrere & Denegre
201 St. Charles Avenue
New Orleans, La. 70170-5100
504/582-8000
Attorneys for Counsel for Respondent,
Centennial Insurance Company

***Counsel of Record**

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served upon counsel for all parties by placing same into the United States Mail or Hand Delivery on this the 7th day of April, 1993.

ROBERT B. ACOMB, JR.

APPENDIX A

APPENDIX:

Listing of Parent and Subsidiary Companies
in Accordance with Supreme Court Rule 29.1:
Atlantic Mutual Insurance Companies

U.S. Department of Labor

Employment Standards Administration
Office of Workers' Compensation Programs
Division of Longshore and Harbor Workers' Compensation

061 LS-504 CASE #07-108275
Injury Date 11/29/85
EMPLYR Johnson Brothers Corp.
TO: Ernest D. Sharp
Rt. 15, Box 382
Slidell, LA 70461

We have received the report of the injury which you sustained on the above date, and it appears to fall under the jurisdiction of the Longshore and Harbor Worker's Compensation Act, or an extension of that law.

The Act requires your employer or its insurance company to furnish all medical, surgical, hospital treatment and supplies which are needed because of the injury. *(The term injury also includes occupational disease.)* Medical care may be furnished by and under the direction of a physician of your choice, but you must advise your employer of your choice of physician so that the treatment can be authorized. You may not select a physician or medical care provider who is currently not authorized by the Department of Labor to provide medical care or services under the Act. Upon request your employer will show you a list of such physicians and medical care providers.

If you did not lose more than three days from work, have no need for further medical care and did not sustain any permanent injury or disability, no particular action is required by you. Your case will be closed.

When an employee loses more than three days from work and has pay loss for more than three days, he/she is entitled to compensation for pay loss at the rate of two-thirds of his/her average weekly wage. The first payment of compensation is due fourteen days after your employer has knowledge of the injury and is to be paid semimonthly during the continuance of the disability. If your disability exceeds fourteen days, you are also entitled to receive compensation for the first three days of your pay loss. If you lost pay in excess of three days and did not receive a check, contact your employer. Also, please contact this office if you believe your injury has caused: (1) any permanent disability to your body, or (2) any serious disfigurement to the head, face, neck or other normally exposed areas, which may handicap you in securing or maintaining employment.

If benefits are not provided voluntarily by the employer or the insurance company, you may wish to file a written claim with this office. To protect your interest, a claim may be filed within one year following the date of injury. In cases of hearing loss, a claim may be filed within one year after receipt by an employee of an audiogram, with the accompanying report thereon, indicating that the employee has suffered a loss of hearing. In cases involving occupational disease which does not immediately result in death or disability, a claim may be filed within two years after the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. If compensation payments have been made and you feel you are entitled to additional benefits, a claim must be filed within one year from the date of the last payment. Failure to file a written claim within these time deadlines may result in loss of your right to benefits.

Please contact this office if you have questions concerning your entitlement to benefits. Refer to the file number at the top of this letter to identify your case.

IMPORTANT NOTICE

Section 31 (a)(1) of the Longshore Act, 33 U.S.C. 931 (a)(1), provides, as follows: Any claimant or representative of a claimant who knowingly and willfully makes a false statement or representation for the purpose of obtaining a benefit or payment under this Act shall be guilty of a felony, and on conviction thereof shall be punished by a fine not to exceed $10,000, by imprisonment not to exceed five years, or by both.

U.S. DEPARTMENT OF LABOR
Employment Standards Administration
Office of Workers' Compensation Programs
Division of Longshore and Harbor Workers' Compensation
701 Loyola Avenue, Room 13032
New Orleans, LA 70113

October 5, 1989

File No.: 7-102714
Re: Ernest Sharp
INJ: 11/29/85
EMPLOYER: Johnson Bros. Corp.

Mr. Ernest Sharp
Employers Insurance of Wausau
Kevin Galatas, Esquire
Joseph Guilbeau, Esquire
Honorable Richard D. Mills

Gentlemen:

The enclosed Decision and Order of the Administrative Law Judge is hereby served upon the parties to whom this letter is addressed. The decision was based on all of the evidence of record, including testimony taken at a formal hearing, and on the assumption that all available evidence has been submitted.

The transcript, pleadings, and compensation order has been dated and filed in the Deputy Commissioner's Office. Procedures for appealing are described on the back of this letter.

The employer/insurance carrier is hereby advised that if the order awards compensation benefits the filing of an appeal

does not relieve that party of the obligation of paying compensation as directed in this order. The employer/insurance carrier is also advised that an additional 20 percent is added to the amount of compensation due if not paid within ten days, notwithstanding the filing of an appeal, unless an order staying payments has been issued by the Benefits Review Board, U.S. Department of Labor, 1111 - 20th Street, N.W., Suite 757, Washington, D.C. 20036.

Sincerely,

[s] Donnett Glenn
Donnette S. Glenn
Deputy Commissioner

Enclosure

RECEIPT, RELEASE, INDEMNITY AND DISTRIBUTION OF LITIGATION PROCEEDS AGREEMENT

WHEREAS, on or about November 29, 1985, Ernest D. Sharp was employed by Johnson Brothers Corporation as a welder/pile driver aboard a group of barges and other vessels engaged in a repair project of the Lake Pontchartrain Railroad trestle; and

WHEREAS, on or about November 29, 1985, while acting in the course and scope of that employment, Ernest D. Sharp allegedly injured his left ankle, knee, neck and lower back when a load being transferred overhead by a barge-mounted crane fell upon him while he was located on the bow of a tug boat in Lake Pontchartrain; and

WHEREAS, Ernest D. Sharp has undergone extensive medical treatment and/or examination by Dr. Krieger, Dr. John Manale, Dr. G. Gernon Brown and other physicians for injuries to his left ankle, left knee, lower back and neck and other parts of his mind or body; and

WHEREAS, the undersigned, Ernest D. Sharp has brought suit against his employer, Johnson Brothers Corporation and its insurers, Employers Insurance of Wausau, St. Paul Fire & Marine Insurance Company and Centennial Insurance Company for damages as a result of the aforementioned accident and injuries in an action entitled "Ernest D. Sharp v. Johnson Brothers Corporation, et al," Civil Action No. 86-5005, Section "K" in the United States District Court for the Eastern District of Louisiana, liability being specifically denied by Johnson Brothers Corporation and Employers Insurance of Wausau; and

WHEREAS, Brenda Sharp, also undersigned, is presently married to Ernest D. Sharp and was so married to him on the date of the aforesaid accident and is now his only and lawful wife; and

WHEREAS, in recognition of the significant dispute regarding the classification of amphibious workers like the

undersigned, Ernest D. Sharp, within the correct legal status as "Jones Act seaman", or alternatively, "a maritime employee" entitled to recover under the Longshore and Harbor Workers' Compensation Act ("LHWCA") or in the further alternative, an employee entitled only to recover under the appropriate state's workers' compensation system, and the legal right of such amphibious workers with ambiguous status to simultaneously pursue mutually exclusive remedies, in particular, a seaman's remedies of the Jones Act, 46 U.S.C. Section 688, and general maritime law for unseaworthiness and maintenance and cure, as opposed to the Longshore and Harbor Workers' Compensation Act, which precludes claims by Jones Act seamen; and

WHEREAS, in recognition of the legal right that workers such as Ernest D. Sharp, undersigned, has to have a jury of his peers determine whether he is in fact a Jones Act seaman entitled to a seaman's remedies; and

WHEREAS, following Ernest D. Sharp's accident, pursuant to a policy of insurance issued to Johnson Brothers Corporation, Employer's Insurance of Wausau paid certain weekly compensation benefits and medical expenses to or on behalf of Ernest D. Sharp in the amount of $39,698.75 and $35,661.86, respectively, for a total of $75,360.61, to which he may have been entitled under the LHWCA until such benefits were terminated; and

WHEREAS Ernest D. Sharp has settled all rights and claims he may have had against Johnson Brothers Corporation and its worker's compensation carrier, Employers Insurance of Wausau, for worker's compensation and other statutory benefits under the Longshore and Harbor Workers' Compensation Act pursuant to a separate settlement application filed in accordance with 33 U.S.C. §908(i) of the LHWCA in exchange for a lump sum payment of $200,000.00, which application has been approved and which money has been tendered in accordance therewith, all of which is acknowledged hereto by the undersigned; reserving all rights to pursue any parties who may be

liable to him for non-statutory claims (that is, claims other than for worker's compensation or other statutory benefits) he may have in accordance herewith; and

WHEREAS, in order to avoid the costs and uncertainties of further litigation for non-statutory remedies the undersigned, Brenda Sharp, Ernest D. Sharp, his employer, Johnson Brothers Corporation, and its compensation carrier, Employers Insurance of Wausau, have agreed to adjust and settle their remaining differences on the basis hereinafter set forth;

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS:

That for and in consideration of the full sum of TWENTY FIVE THOUSAND AND NO/100 ($25,000.00) DOLLARS which is hereby paid by Employers Insurance of Wausau on its sole behalf pursuant to a policy of insurance issued by Employers Insurance of Wausau to Johnson Brothers Corporation in effect on the date of Ernest D. Sharp's accident and in further consideration of the additional payment of TWO HUNDRED THOUSAND AND NO/100 ($200,000.00) DOLLARS which has previously been paid to Ernest D. Sharp by Employers Insurance of Wausau for its own behalf and that of Johnson Brothers Corporation in accordance with the terms of an approved 33 U.S.C. §908(i) settlement application, both of which payments are hereby acknowledged by the undersigned and due acquittance and discharge therefor granted, the said Ernest D. Sharp and Brenda Sharp, for themselves, their heirs, assigns and personal representatives, DO HEREBY RELEASE, REMISE AND FOREVER DISCHARGE Employers Insurance of Wausau, including its agents, servants, employees, officers, managers, stockholders, directors, underwriters, successors, assigns of and from any and all rights, claims, liens, remedies or causes of action of whatever nature which they or their heirs now have or which they, their heirs, assigns, or legal representatives may hereafter acquire, for damages, costs, expenses, loss of earnings, loss of society, loss of consortium, pecuniary and non-pecuniary dam-

ages, pain, suffering or disability, including the aggravation of any prior or pre-existing condition, arising out of or in any way connected with the aforementioned accident and/or injuries, including, without limitation, all claim under the Jones Act (46 U.S.C. Section 688), the laws of the State of Louisiana or any other state or nation, the Longshore and Harbor Workers' Compensation Act (33 U.S.C. Section 901, et seq.) the admiralty and maritime laws of the United States or any other nation, or any other loss which may afford them or their heirs a right or cause of action based upon any claim of unseaworthiness of any of the vessels involved with his employment with Johnson Brothers Corporation or the aforementioned accident including, claims for punitive damages, or for past or future maintenance and cure or damages, including attorney's fees and punitive damages for failure to pay or timely pay maintenance and cure, including punitive damages for wanton, willful, or malicious acts or conduct, or under any compensation statute, federal or state, or negligence, or otherwise in tort, civil or maritime or for retaliatory discharge and whether on account of or in any way connected with the alleged accident and injuries, as aforementioned, and whether the same be now known or hereafter discovered.

The undersigned Ernest D. Sharp and Brenda Sharp warrant that they have discussed Ernest D. Sharp's physical and medical condition with physicians of his own choosing and are fully aware of the medical and physical condition and of the prognosis for the future. They further warrant that after discussing his present and perspective medical and physical condition with physicians of their own choosing, they are fully aware that his condition may grown worse than it is or seems to be; that in executing this Receipt, Release, Indemnity and Distribution of Litigation Proceeds Agreement, THEY ARE COMPLETELY GIVING UP AND DISCHARGING ANY AND ALL RIGHTS against Employers Insurance of Wausau as set forth herein and that they are desirous of accepting the sum of TWENTY FIVE THOUSAND AND NO/100 ($25,000.00) DOLLARS paid pur-

suant to this agreement in full settlement and discharge of all legal rights arising out of or resulting from the alleged accident and/or accidents and injuries as aforementioned, and are of the opinion that this settlement is reasonable and proper under the circumstances.

It is further understood and agreed by the undersigned parties and the parties being released hereto that Ernest D. Sharp intends to pursue such remedies as may be available to him from Johnson Brothers Corporation insofar and only to the extent that it may be insured by St. Paul Fire & Marine Insurance Company and by Centennial Insurance Company as well as such remedies as may be available to him from St. Paul Fire & Marine Insurance company and Centennial Insurance Company individually, as well as against such other parties, persons, firms or corporations who may have some responsibility to the undersigned as a result of the aforementioned accident. To the extent necessary, the undersigned reserves such rights as they have or may have against these persons, corporations or insurers. In connection with this reservation of rights, all parties to this release agree that it is not the intention of any party that this release run in favor of any person, firm or corporation not specifically a party hereto. However, and in connection with this reservation of rights and in exchange for the aforementioned valuable consideration, it is the express intention of the undersigned to continue the prosecution of such claims as they have or may have against such other persons, firms, corporations, or insurers as set forth above, the undersigned agree to defend, indemnify and hold completely harmless Johnson Brothers Corporation insofar and to the extent it is insured by Employers Insurance of Wausau or to the extent it is uninsured by either St. Paul Fire & Marine Insurance Company and/or Centennial Insurance Company, individually of and from any and all claims and demands which may be made against it by any person, firm, corporation or insurer as a result of the aforementioned accident and litigation or any document, contract, insurance policy or other thing related thereto, and in

connection with this undertaking, agree that the attorney representing the undersigned shall proceed to the defense of Johnson Brothers Corporation and Employers Insurance of Wausau in their above capacities in the event that suit is filed or claim otherwise is made against Johnson Brothers Corporation and Employers Insurance of Wausau in their above capacities.

In connection with the reservation of rights and express intention, the undersigned agree and covenant not to sue Johnson Brothers Corporation except insofar as it may be insured by St. Paul Fire & Marine Insurance Company and/or Centennial Insurance Company and not to sue Employers Insurance of Wausau in any capacity; and agree and covenant not to enforce any judgment they may receive as a result of the above reservation of rights insofar as such may require any payment by Johnson Brothers Corporation that is not uninsured or to be reimbursed by St. Paul Fire & Marine Insurance Company and/or Centennial Insurance Company; and/or any payment by Employers Insurance of Wausau in any capacity or manner whatsoever.

It is expressly understood and agreed that the payment herein referred to is made purely by way of compromise and settlement and is in no way to be construed as an admission of liability on the part of any party hereto.

DISBURSEMENT PROVISIONS

In exchange for the valuable consideration aforementioned, in the event any monetary proceeds are obtained through judgment or settlement of any claim of whatsoever type or nature, including but not limited to, any claim preserved to the undersigned by 33 U.S.C. § 905(b) as a result of the above reservation of rights, the undersigned do hereby agree to the following disbursements of such proceeds:

a. the undersigned shall first pay their attorney, Kevin A. Galatas, his contingency fee of 40% plus $15,000.00 which is

stipulated to be the reasonable litigation expenses incurred as of this date pursuant to prior litigation arising out of the aforementioned accident plus all additional expenses reasonably and directly incurred in further pursuit of litigation pursuant to the reservation of rights in the future, minus any amount that might be taxed as costs by the court in which such further litigation is pursued;

b. from the remaining proceeds, the first $225,000.00 shall be paid by the undersigned directly to Employers Insurance of Wausau, acknowledging that if the proceeds are insufficient to pay the full $225,000.00 to Employers Insurance of Wausau, then the entire amount of any such remaining proceeds after deduction of those items in accordance with "a." above shall be paid to Employers Insurance of Wausau;

c. thereafter, if there shall be any remaining proceeds, the next $25,000.00 shall be retained by the undersigned;

d. thereafter, if there should be any remaining proceeds, the next $75,360.61, representing the amount of past compensation and medical benefits paid to or on behalf of Ernest D. Sharp by Employers Insurance of Wausau in weekly compensation and medical benefits that may have been owed under the LHWCA, shall be returned to Employers Insurance of Wausau regardless of whether such payments are deemed to have actually been owed to Ernest D. Sharp;

e. thereafter, any remaining proceeds shall be retained by the undersigned;

f. furthermore, the undersigned shall not settle any claims against any parties whatsoever to which their rights to pursue were reserved without the express, written consent of Employers Insurance of Wausau. If any such claims are settled without the express, written consent of Employers Insurance of Wausau then the entire amount of any such settlement proceeds shall be immediately payable to Employers Insurance of Wausau without benefit of demand, notice or requirement default. The undersigned do hereby also agree that if it is necessary for Employers Insurance of Wausau to retain the services of an attorney or otherwise incur legal expenses in enforcing this provision against the undersigned, then the undersigned shall pay all such associated litigation costs, including a reasonable attorney's fee.

NOW COMES Brenda Sharp, in further consideration of the aforesaid payment and in recognition of the consideration paid pursuant to the separate and independent 33 U.S.C. §908(i) settlement and without litigation joins and adopts all and singular, this Receipt, Release, Indemnity and Distribution of Litigation Proceeds Agreement, and all its undertakings and obligations with respect to any and all rights, claims, liens, remedies or causes of action of whatever nature she may have with respect to her marriage to Ernest D. Sharp or which their heirs, assigns or legal representatives, now have or may hereafter acquire for loss of society, loss of services, loss of consortium, pain and suffer-

ing, pecuniary and non-pecuniary damages of any description, arising out of or in any way connected with the aforementioned accident and injuries to Ernest D. Sharp.

It is expressly understood and agreed that the payment herein referred to is made purely by way of compromise and settlement and is in no way to be construed as an admission of liability on the part of any party hereto.

IN WITNESS WHEREOF, this Receipt, Release, Indemnity and Distribution of Litigation Proceeds Agreement has been executed in multiple originals in the presence of the undersigned witnesses at New Orleans, Louisiana, this 5th day of October, 1989.

WITNESSES:

[s] Joseph B. Guilbeau _____ [s]Ernest D. Sharp
ERNEST D. SHARP

[s]Sandra Tomlinson _____ [s]Brenda F. Sharp
BRENDA SHARP

SWORN TO AN SUBSCRIBED
BEFORE ME THIS 5TH
DAY OF OCTOBER, 1989.

[s] Kevin Galatas
NOTARY PUBLIC

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF ORLEANS

BEFORE ME, the undersigned authority, personally came and appeared:

ERNEST D. SHARP

who, after first being duly sworn, did depose and say:

That he is the person who executed the above and foregoing Receipt, Release, Indemnity and Distribution of Litigation Proceeds Agreement;

That he has read same and understands its consequences;

That all of his rights under the Jones Act, the general maritime law, including wages, maintenance and cure and a warranty of seaworthiness, under the laws of the United States of America and the State of Louisiana and under federal and state compensation acts have been fully explained to him by his attorney, Kevin A. Galatas, and that he fully understands all of these rights and that he accepts the amount stated in said Receipt, Release, Indemnity and Distribution of Litigation Proceeds Agreement, in full and final settlement of all claims;

That he has signed said Receipt, Release, Indemnity and Distribution of Litigation Proceeds Agreement and executed it as his own free act and deed.

[s]Ernest D. Sharp
ERNEST D. SHARP

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 5TH DAY
OF OCTOBER, 1989.

[s] Kevin Galatas
NOTARY PUBLIC

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF ORLEANS

BEFORE ME, the undersigned authority, personally came and appeared:

BRENDA SHARP

who, after first being duly sworn, did depose and say:

That she is the person who executed the above and foregoing Receipt, Release, Indemnity and Distribution of Litigation Proceeds Agreement;

That she has read same and understands its consequences;

That all of her rights under the Jones Act, the general maritime law, including wages, maintenance and cure and a warranty of seaworthiness, under the laws of the United States of America and the State of Louisiana and under federal and state compensation acts have been fully explained to her by her attorney, Kevin A. Galatas, and that she fully understands all of these rights and that she accepts the amount stated in said Receipt, Release, Indemnity and Distribution of Litigation Proceeds Agreement, in full and final settlement of all claims;

That she has signed said Receipt, Release, Indemnity and Distribution of Litigation Proceeds Agreement and executed it as her own free act and deed.

[s]Brenda F. Sharp
BRENDA SHARP

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 5TH DAY
OF OCTOBER, 1989.

[s]Kevin Galatas
NOTARY PUBLIC

CERTIFICATE OF PLAINTIFF'S ATTORNEY

I, Kevin A. Galatas, attorney for Ernest D. Sharp and Brenda Sharp, do hereby declare that I have explained to each all rights which each may have as a result of the accident sustained by Ernest D. Sharp on or about November 29, 1985, and the consequent injuries including, but not limited to, the Jones Act, the general maritime law, the laws of the United States of America, the State of Louisiana, the Longshoremen's and Harbor Worker's Compensation Act, the Louisiana Workmen's Compensation Act, and all other rights which each may have; that I have recommended to them the settlement set forth in the attached Receipt, Release, Indemnity and Distribution of Litigation Proceeds Agreement; and that I am satisfied that they fully understand my advice and that each has executed the foregoing Receipt, Release, Indemnity and Distribution of Litigation Proceeds Agreement voluntarily and with full knowledge of the consequences of this Receipt, Release, Indemnity and Distribution of Litigation Proceeds Agreement.

[s]Kevin A. Galatas
KEVIN A. GALATAS

WITNESSES:

[s]Joseph B. Guilbeau

[s]Sandra Tomlinson

STATE OF MISSISSIPPI
COUNTY OF HANCOCK

AFFIDAVIT

Before me, the undersigned authority, personally came and appeared:

ROBERT W. BREEDEN, JR.

who, being duly sworn, did depose and say:

My name is Robert W. Breeden, Jr., age sixty-two, and I reside at 978 S. Beach Boulevard, Bay St. Louis, Mississippi 39520.

I was employed in the insurance business for approximately thirty-five years as an underwriter, agent, and broker handling primarily ocean marine casualty and property insurance. I have been a member of the Society of Property and Casualty Underwriters since 1956. I have been an instructor of insurance at Loyola University in New Orleans and have taught various courses dealing with ocean marine, casualty and liability insurance at seminars sponsored by Tulane University, the International Trade Mart, and the Society of Property and Casualty Underwriters. During my professional insurance career I handled numerous maritime clients' insurance business affairs and was familiar with the form of policies used as well as industry custom and practice. I held an Unlimited Chief Mate's License (any tonnage, any ocean), issued by the U.S. Coast Guard, from October 1946 until September 1986.

I have qualified as an expert in the field of Marine, Casualty and Property Insurance in various state and federal courts, including the Eastern and Western Districts of Louisiana, Northern District of Mississippi, Tennessee, the State of Louisiana, the State of Mississippi, and the State of Oklahoma.

I have reviewed the following:

1. A copy of Employer's of Wausau Worker's Compensation and Employer's Liability Policy No. 03170405 8109, effective from April 1, 1984 to April 1, 1987 and issued to Johnson Bros. Corporation, et al.

2. A copy of St. Paul Fire and Marine Insurance Company Protection and Indemnity Policy No. 322JA0124, effective from April 1, 1985 to April 1, 1986 and issued to Johnson Bros. Corporation, et al.

3. A copy of Excess Protection and Indemnity Policy No. 332JA0126, effective from April 1, 1985 to April 1, 1986, and issued to Johnson Bros. Corporation, et al.

4. A copy of Corroon & Black of Louisiana, Inc. advice of insurance dated May 7, 1985 and issued to Johnson Bros. Construction Corporation, along with a copy of applicable portions of Centennial Insurance Company Protection and Indemnity Policy No. 1230014185090 issued to Central Marine Service, Inc. and others.

5. A copy of Answers to Interrogatories of plaintiff and defendant.

6. A copy of Wausau Insurance Company's Umbrella Liability Policy No. 0327 02 058109, effective from April 1, 1984 to April 1, 1987 and issued to Johnson Bros. Corporation, et al.

Based upon my experience as outlined above, and the custom, practice and usages of the insurance business, it is my opinion that:

a. Any exposure of Johnson Bros. to the claimant Mr. Sharp is insured by the St. Paul Protection and Indemnity Policy No. 322JA0124 and Excess Protection and Indemnity Policy No. 322JA0126. (I understand that St. Paul has admitted coverage without reservation of rights and is actively defending Johnson Bros.)

b. Additional insurance coverage for Johnson Bros. is provided by the Wausau Workers' Compensation and Employment Policy No. 031704058107, and Umbrella Policy No. 032702058109 and it is my opinion that coverage of these policies will depend upon whether Mr. Sharp is a "seaman" or "not a seaman."

If Mr. Sharp is not a seaman, the Workers' Compensation & Employers Liability Policy No. 031704058107 and Excess Policy No. 032702058109 will provide protection to Johnson Bros:

If I assume that the claimant is "not a seaman" then I believe that:

1) His claim is covered under State or Federal Workers' Compensation Statutes and would be covered by the policies named in paragraph "b" above,

2) If his claim is allowed under §905(b) of the Longshore Act there will be coverage for it under the Employers Liability section of the policies named in paragraph "b" above.

If I assume that the claimant is a "Seaman" then I believe that his claim would be covered under policies enumerated in

paragraph "b" above only if he is found not to be "a master or member of the crew of any vessel."

My reason for reaching this conclusion is that Coverage B "Employers Liability" in its standard form encompasses all claims by employees against their employer which include Jones Act and claims of seamen under the general admiralty law.

Wausau's Policy No. 031704058107 contains a "maritime exclusion endorsement" which should be subject to strict interpretation against the insurer since it is an exclusionary endorsement rather than an extension of policy coverage. This is particularly true regarding the question of whether the term "master or member of the crew of any vessel" is identical to the term "seaman". In the insurance industry the term "master or member of the crew of any vessel" has been used for many years and was placed in policy forms similar to those attached to the Wausau Policy No. 031704058107 so as not to exclude "Sieracki Seamen" prior to the amendment of the USLHWCA in 1972. It was not intended that this wording "master or member of the crew of any vessel" have the same meaning as "seaman" since insurers did not intend to exclude "status seamen" in the maritime exclusion endorsement. This position of the insurance industry is confirmed by the attached copy of letter dated June 10, 1974 from the National Council on Compensation Insurance addressed to Insurance Commissioner Sherman Bernard and copy of the Circular to members and subscribers from the National Council on Compensation Insurance dated July 12, 1974. In 1974 affiant raised the question of the meaning of "master and member of the crew of any vessel" with the National Council on Compensation Insurance. Their letter of September 9, 1974, copy attached, confirmed again that only "per se seamen" were intended to be excluded.

If the insurer wished to exclude "seamen" the insurer could have worded the exclusion endorsement using the word "seamen" if such had been the intention.

Further, I note that the "Maritime Coverage Endorsement" attached to the policy, which was drafted in 1984 refers to "a vessel" rather than "any vessel." This endorsement also refers to injury and death of "master and members of the crew if a vessel." It is an endorsement which limits rather than extends coverage and therefore if strictly construed against insurer would not apply to coverage for Mr. Sharp's claim for the same reasons mentioned above plus the fact that Mr. Sharp did not work on any one vessel.

The Wausau policy was prepared with standard forms that I recognize, which include the "maritime exclusion endorsement" and the "maritime coverage endorsement" which were prepared for the insurance industry by the National Council on Workers' Compensation Insurance. All insurance companies use these forms.

Mr. Sharp's work aboard several barges in the repair of a bridge no doubt gives him the right to claim benefits due a seaman. However, I do not believe that such work makes him a "master or member of the crew of any vessel" as that term is used in its most restrictive sense in the exclusion of an insurance policy. Neither would he be required to have "seamen's papers".

It is for the foregoing reasons that I conclude that the Wausau policies provide Johnson Bros. with coverage for any and all claims asserted by Mr. Sharp in this litigation.

My reasons for concluding that there is no coverage for Johnson Bros. under the Centennial P&I policy for the claims asserted by Mr. Sharp are as follows:

1.) The P&I policy covers the liability of the insured as owner of the vessel. The form of the policy makes it a vessel liability coverage and furnishes protection for liabilities which are directly related to the vessel's operation but does not extend coverage to any assured for liabilities not directly related to the operation as a vessel. In the case of Mr. Sharp it appears that the spud barge was not being operated as a vessel but

was simply a work platform on which a crane was operating in the repair of the bridge.

2.) Centennial insured "spud barges" which are unmanned, unpowered vessels and not crane barges. Even if the Centennial P&I coverage were extended to cover Johnson Bros.' crew exposure, which I think is questionable, there would still be no coverage under the policy for Johnson Bros. since a spud barge is uniformly recognized as an unmanned vessel without a crew. Furthermore, even if the Centennial P&I policy had been amended to cover a "crane barge," the operations of the crane in bridge repair would still have required that Johnson Bros. (to be protected) carry and pay for both Workers' Compensation and Employers' Liability and Comprehensive General Liability insurance policies to provide coverage for those liabilities which do not involve the operation of the spud or crane barge as a vessel and for workers' compensation and other employers' liability exposures not covered by the P&I insurance. This additional coverage was in fact carried by Johnson Bros. and I assume this was done for their protection.

3.) The operation of a crane barge as a vessel presents substantially greater P&I insurance risks than does the operation of unmanned spud barges and consequently if covered would require the payment of a much higher P&I insurance premium. Risk of claims resulting from the operations of a crane barge which are in addition to the risks of claims which might arise from the operations of an unmanned spud barge are not insured by the P&I insurance on a spud barge. If a spud barge is to be used as a crane barge it would be necessary to report the change in operation to the P&I underwriters and perhaps to pay an additional premium.

4.) I see no evidence that the Centennial insurance policy was amended other than to include Johnson Bros. as an "additional insured." There was not any change in the risk description to change spud barge to crane barge nor extension of coverage to insure Johnson Bros. crew and employees.

5.) Deck or spud barge rental firms usually will routinely include charterers as additional insured in the insurance on the barge but at the same time, in my experience, they uniformly exclude from the P&I coverage liability of the charterer to the charterer's crew and employees. This is the standard procedure since in most cases the charterer already has insurance coverage which will cover or can be extended to cover his employees respecting the work they perform. The extension of the P&I coverage on the barge to include crew and employees of charterer will not completely solve the charterer's problems with respect to the need for additional proper insurance. It would be misleading because of the "escape type" "other insurance clause" found in all P&I policies. The difference in exposures of various charterers also requires special underwriting consideration in order to provide P&I coverage on employees of charterers.

Here, this is exactly what was done because Johnson Bros. had their crew coverage insured by the Wausau and St. Paul policies. The charter party required that Johnson Bros. indemnify the owner of the spud barge for all personal injury and death claims of the crew. This contractual liability undertaken by Johnson Bros. is probably insured by the Firemen's Fund Comprehensive General Liability policy No. 97 GTW-71197, referred to in the Umbrella policy or under the Wausau Umbrella Policy No. 032702058109.

In the event that a court would find that Johnson Bros. was covered by the Centennial Policy for the claims of Mr. Sharp, then the "other" insurance clause of the Centennial policy would have to be considered in light of all coverages in the insurance policies of Johnson Bros. enumerated above.

In this case, I note that the Johnson Bros. Wausau policies are subject to a retrospective premium adjustment which means that the final costs of the Wausau policies are based upon the amount of claim payments made under these policies. Consequently, Johnson Bros. probably would like to avoid any payments respecting Mr. Sharp's claims under the Wausau policies and thus save themselves from the payment of higher premiums.

[s]Robert W. Breeden, Jr.
ROBERT W. BREEDEN, JR.

SWORN TO and subscribed)
before me this 7th day)
of April 1988.)
[s]Marie T. Johnson
Notary Public